IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 460 OF 2000

1) Vinod @ Dadya Anandrao Kesarkar
2) Yuvraj Anandrao Kesarkar,
3) Vishwanath @ Bandya Ganesh Pujari ....Appellants.
(Orig.Accd.Nos.1 to 3)

Versus

The State of Maharashtra.. ..... Respondent.

Mr.Shekhar Ingawale, Adv. For the appellants.

Mrs.P.H.Kantharia, APP for the State.

CORAM: V.G. PALSHIKAR
AND
ANOOP V. MOHTA, JJ.

7.9.2004.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order passed by 4th Additional Sessions Judge, Kolhapur on 10.5.2000 the appellants have preferred this appeal on the grounds mentioned in the memo of appeal.

2. With the assistance of learned counsel and the learned Assistant Public Prosecutor we have scrutinized and reappreciated the evidence on the record.

3. The prosecution story stated briefly is that there were disputes amongst the deceased Mohammad and the appellant-accused No.1 on account of rivalry in the business of instant lottery. There was a quarrel between said Mohammad and accused

No.2 on 19.7.1998. On 20.7.1998 when Salim met Mohammad the deceased at about 10.00 a.m. Mohammad had disclosed to Salim that accused No.2 brother of accused No.1 had quarrel with him and he is going to ask accused No.1 about the same. Mohammad met accused No.1 in front of house of one Basappa Hanchnale while accused No.1 was brushing his teeth. While Mohammad was talking to accused No.1, accused No.1 slapped him and accused Nos.2 nd 3 came there running from the tank side and accused No.2 took out a knife from his waist and gave blows to Mohammad. Salim then rushed to Mohammad to save him. But accused No.2 attempted to stab him also when Salim evaded the blow. Salim went to his home and called his family members at the scene of offence where Mohammad was found lying dead with various injuries on his person. The assailants had by then run away. It was at that time when Anandrao Savalaram Khedkar (P.W.6) was proceeding by the house of Shilya Henchnale when he noticed accused Nos.1 and 3 had caught Mohammad and accused No.2 stabbing Mohammad by a knife. Accused Nos.1 to 3 then ran away in Salim's rickshaw. One Sunil Balaso Bhosale (P.W.7) who was standing near the 2nd bus stop after hearing shouts proceeded towards house of Henchnale and saw the incident.

4. The prosecution has examined in all 14 witnesses to prove its case that the accused were the persons who committed the murder of the deceased. Of these 14 witnesses P.W.5-Salim Shaukat Shaikh and P.W.6-Anandrao Savlaram Khedkar are the eye witnesses. Rest are supporting the prosecution case in general.

5. P.W.1-Anil Pandurang Mane is panch witness who proves the spot

panchnama and inquest panchnama respectively Exhs.35 and 36. P.W.2-Uday is another panch witness who proves the arrest of the accused and seizure of his clothes etc. vide panchnama Ex.50.

6. P.W.3-Chandrakant Anandrao Tibile is panch to the seizure and attachment of the clothes of Salim and P.W.5-Salim is the eye witness. The panchnama is proved by P.W.3-Chandrakant as Ex.52.

7. P.W.4-Uvaraj Pandurang Khandagale is witness to the arrest of the accused. He is also witness to the recovery of the knife at the instance of the accused. He proves the document showing this as panchnamas being Exs.54 and 55 respectively. P.W.5-Salim, as stated earlier, is the eye witness and brother of the victim. He narrates as to how the assault took place. According to him there already existed rivalry between the accused and the deceased and the incident took place in the morning because of this old rivalry. The witness has deposed that when he was carrying passengers from Gangavesh to Lakshatirth vasahat he met the victim Mohammad and was told by the victim that accused No.2 quarreled with victim on previous night. He therefore wanted to inquire as to why that quarrel took place. The witness then says that he along with Mohammad went to the place where accused persons resided and while he was collecting fare from the passengers Mohammad proceeded to the house of accused. Accused No.1 was brushing his teeth near the house when Mohammad started talking with accused No.1-Vinod. Vinod then held Mohammad and accused Nos.2 and 3 came there running and accused No.3 caught Mohammad, accused No.2 took out knife from his west and gave

knife blows to Mohammad. Witness then states that he rushed to save Mohammad when accused No.2 tried to give him blow which invaded but his shirt was torned. The witness therefore ran away and came back along with members of his family. Police came and he lodged the First Information Report. According to this witness therefore the victim was already on the street on his way to visit the accused and obviously therefore was wearing streetwise clothes.

8. The other eye witness is P.W.6-Anandrao Savlaram Khedkar. This witness states that he was coming with Sunil-P.W.7 towards the house of Hanchanale when he saw accused Nos.1 and 3 had caught deceased Mohammad and accused No.2 was stabbing Mohammad by knife. He shouted towards the accused when his brother Sadashiv came to the spot. According to this witness the accused gave five to seven blows on Mohammad's person whereby he fell down. There is thus material difference between what has been stated by Salim as to what had happened and what this witness has to say. The other person Sunil Bhosale-P.W.7 who was present and has seen the occurrence has turned hostile. But both the witnesses have categorically stated in their cross examination that the victim was not only in banian and underwear.

9. The attire of the victim assumes significance from the fact that the photographs of the dead body were taken immediately after occurrence and before the body was removed for post mortem. These photographs reveal that the victim was only in banian and underwear. One photograph shows the injuries on the body when while the banian is lifted upward. There is no explanation whatsoever by the prosecution as to how

the body happened to be in banian and underwear when the victim was seen on road sat into the rickshaw of Salim and went to the spot. The suggestion that the victim was moving around in banian and underwear is denied by both the eye witnesses. What happened to the clothes of the victim is not known. Why they were not on the body of the victim when photographs were taken on the spot before the panchnama and before the body was sent for post mortem. This therefore is a glaring circumstance which is not explained by the prosecution. Then this photograph shows two injuries on the person of Mohammad whereas one witness talks about seven injuries having been inflicted and the other says that two injuries were inflicted. There is thus material contradiction to all these aspects also. Even if the entire evidence of the prosecution is accepted it becomes irreconcilable with the claim the prosecution has made. According to the prosecution the victim was on the road when he saw P.W.5-Salim driving his rickshaw and got into that rickshaw went to the place where accused were staying and started a dialogue with accused No.1. It is not the case of the prosecution that in doing all this he was clad only in banian and underwear yet the body was found clad only in banian and underwear. This discrepancy is not explained by the prosecution.

10. P.W.5-Salim has categorically stated that there was no altercation between the victim and accused No.1 when he was collecting money from the passengers and was looking towards the accused No.1 and victim. If that is accepted there is no explanation as to why accused Nos.2 and 3 came on the site and accused Nos.1 and 3 caught hold of Mohammad and accused No.2 stabbed him several times. There is no evidence whatsoever of premeditation led by the prosecution.

11. Enmity reportedly existing between the parties is year old and it hurt both the victim and the accused. It is an admitted position on record that thereafter the accused and victim were not on talking terms. There is also no explanation as to why the victim clad in banian and underwear would go early in the morning to the place of accused No.1 and get himself killed. These lacunae therefore are of serious nature and consequently we find it difficult to hold that the prosecution has proved beyond reasonable doubt the involvement of accused persons in the crime. There is however no evidence whatsoever against accused Nos.2 and 3. Even the evidence against accused No.1 as discussed above is not adequate enough for maintaining the order of conviction. In the result appeal succeeds and is allowed. Accused, if in jail are liable to be released forthwith.